IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

ORDER

M/s. Dharmendra Construction Company
Vs. State of Rajasthan & Others
(S.B. Civil Misc. Application No.107/2008)

S. B. Application under Section 151 CPC for revival of Arbitration Application No.6/2005.

Date of Order: September 19, 2008.

PRESENT

HON'BLE MR. JUSTICE SHIV KUMAR SHARMA

Mr. Satish Chand Mittal, for the applicant.

Mr. S.S.Sharma, Addl.Govt.Advocate for the State.

BY THE COURT:

On May 4, 2006 SB Arbitration Application No.6/2005 was decided and following order came to be passed:-

> "Having heard the submissions, in view of the fact that the applicant has already filed civil suit before Additional Civil Judge No.5 Kota the application is not maintainable.
> The application stands dismissed as indicated above."

2. Now instant application has been filed under Section of 11 of Arbitration and Conciliation Act,1996 seeking appointment of independent Arbitrator along with the order dated July 14, 2008

of the Apex Court, which reads as under:-

> "Leave granted.
> 2. Heard the learned counsel for the parties.
> 3. It has now been brought to the notice of this court that the civil suit filed by the appellant has already been withdrawn. A copy of the same has already been filed in this Court with an affidavit. In this view of the matter, the impugned order is set aside and the High Court is directed to decide the application filed by the appellant under Section 11 of the Arbitration and Conciliation Act,1996 for appointment of an Arbitrator which was registered as S.B. Arbitration Application No.6 of 1005 before the High Court of Judicature for Rajasthan, Jaipur Bench. It is expected that the said application shall be decided by the High Court as early as possible preferably within six months from the date of supply of a copy of this order.
> 4. We, therefore, make it clear that we have not gone into the merits of the application under section 11 of the Arbitration and conciliation Act which shall be decided by the High Court in accordance with law.
> 5. For the reasons aforesaid, the impugned order is set aside and the appeal is allowed to the extent indicated above. There will be no order as to costs."

3. Pursuant to the directions of the Apex Court, I have heard learned counsel for the parties.

4. The facts are these:

On June 29, 1994 NIT was issued for execution of Upgradation of Dhowara-Gothra Road No.756/5054/MNP/P/94-95. The applicant submitted tenders with two conditions on August 18, 1994. On

September 29, 1994 tender was accepted and work order for Rs.17,39,845/- was issued. October 14, 1994 and April 3, 1996 were stipulated dates for commencement and completion of the work. On October 3, 2004 the applicant submitted letter for amendment of amount of work Rs.18,35,643.64 in accordance with conditions. On October 17, 2004 notice was issued for taking action under clause 2. On October 20, 2004 the applicant commenced the work. Again on December 10, 2004 the applicant submitted letter informing respondent about commencement of work subject to correction of the estimated cost. The respondent vide order dated January 12, 1995 (Annexure-R/2) cancelled the work order and directed to recover the amount paid. Since work had already been commenced, the respondent cancelled the letter annexure-R/2 vide order dated May 22, 1996 and vide order dated May 22, 1995 modified the work order for Rs.18,35,643.64. Thereafter vide several letters the applicant made request for payment of outstanding amount and the work was completed on April 20, 1997. Despite final extension upto April 20, 1997 penalty of 1.5% was imposed vide letter dated November 27, 1997 (Annexure-R/3). On October 31, 2003 final bill was passed for Rs.51,944/- after adjustment of the amount of security Rs.93,410/-. On October 1, 2004 the applicant made request for referring the case to empowered standing committee as per clause 23 of the

agreement. The request was made in prescribed form along with the draft. When nothing was heard from respondent, the applicant approached this Court.

5. In reply to the application, the respondent averred that the matter has already been referred to Empowered Standing Committee. The document annexure R/1 dated October 23, 2004 has been filed in support of this contention. On this ground the respondent prayed to dismiss the application.

6. I have closely scanned the document Annexure R-1. This is a letter written by Executive Engineer, PWD Division II Bundi to the Superintending Engineer, PWD Circle Kota, which reads as under:-

> "In the above subject it is requested that M/s. Dharmendra Construction Co. Kota has submitted a disputed claim regarding the work of upgradation of Dhowra-Gothra Road (Job No.756/5054/MNP/P/94-95) for settlement and same is being submitted along with para wise comments and factual report for kind your further necessary action please."

7. Alongwith the aforesaid letter original application in triplicate was forwarded to Superintending Engineer, who did not communicate information to the applicant about referring the matter to Empowered Standing Committee.

8. At this juncture a look at clause 23 of the agreement deems necessary, which provides thus:-

> "If any question, difference or objection whatsoever shall, arise in any way in connection with or arising out this instrument or the meaning

> of operation of any part thereof or the rights, duties or liabilities of either party, then save in so far as the decision of any such matter as herein before provided for and been so decided, every such matter consisting a total claim of Rs.50,000/- or above, whether its decision has been otherwise provided for and whether it has been finally decided accordingly, or whether the contract should be terminated or has been rightly terminated shall be referred for decision to the empowered standing committee which would consist of the following:
> (i) Administrative Secretary concerned
> (ii) Finance Secretary or his nominee not below the rank of Deputy Secretary
> (iii) Law Secretary or his nominee not below the rank of Joint L.R.
> (iv) Chief Engineer-cum-Addl. Secretary of the Concerned Department
> (v) Chief Engineer concerned (Member Secretary)
> The Engineer-in-Charge on receipt of application along with prescribed fee (the fee would be two percent of the amount in dispute not exceeding Rs.One lakh) from the contractor shall refer the disputes to the Committee within a period of one month from the date of receipt of application"
>
> (Emphasis Supplied)

9. Evidently Superintending Engineer is not a member of Empowered Standing Committee and there is nothing on record to show that the respondent referred the matter to Empowered Standing Committee under clause 23 of the agreement.

10. In R.S.Avtar Singh Vs. India Tourism Development Corporation Ltd. (2003)2 Arbitration Law Reporter 503 (Delhi), it was indicated that the order of appointment of the Arbitrator would be taken to have been made when communicated and received by the Arbitrator and the concerned party.

11. In the instant case although the respondent in the reply averred that the matter was

referred to Empowered Standing Committee, no document has been placed on record in support of this contention. It has also not been established that the information about appointment of arbitrator was communicated to the applicant.

12. In this view of the matter appointment of independent arbitrator under section 11 of 1996 Act appears necessary.

13. As a result of the above discussion, I appoint Justice Pana Chand Jain (Retired) as arbitrator to settle the disputes. The Arbitrator shall fix reasonable fee and other terms and conditions of arbitration. The Arbitrator is expected to charge reasonable fee. A copy of the order be sent to the Arbitrator.

14. The application stands allowed as indicated above.

(Shiv Kumar Sharma)J.

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